

Information and Data Protection Commissioner

FOI/41/2022

Christoph Schwaiger

vs

Malta Strategic Partnership Projects Limited

FREEDOM OF INFORMATION REQUEST

1. On the 14th July 2022, Mr Christoph Schwaiger (the **“applicant”**) made a request pursuant to article 6 of the Freedom of Information Act (the **“Act”**), Chapter 496 of the Laws of Malta, requesting Projects Plus Limited to provide an electronic *“copy of the feasibility study conducted for luxury accommodation at the Evans Building as per DO2017/49 (Feasibility icw luxury accommodation – Evans Building project) approved on 16/11/17 conducted by Reanda at the cost of €14,500”*.
2. On the 10th August 2022, the applicant was informed that his request has been transferred to Malta Strategic Partnership Projects Limited (the **“Public Authority”**). On the 12th August 2022, the Public Authority informed the applicant that *“your request cannot be met because: the document requested is not held by the Public Authority and the undersigned has no grounds for believing that the document is held by, or connected more closely with functions of, another public authority”*.

3. On the 22nd August 2022, the applicant presented a complaint seeking the reconsideration of the refusal of the Public Authority, on the basis that the *“documentation is linked to a specific direct order, which implies its existence, which contradicts the reply provided by the Public Authority”*.
4. On the 6th September 2022, the Public Authority reiterated its decision and argued that *“after having looking into its records to identify the document requested by yourself, such document is not held and no payment for such work was ever effected by Malta Strategic Partnership Projects Ltd. (previously Projects Malta Ltd). Malta Strategic Partnership Projects Ltd. therefore reiterates that the document requested is not held by it and it has no grounds for believing that the document is held by, or connected more closely with functions of, another public authority. Should it be in possession of the document requested, that is ‘the feasibility study conducted for luxury accommodation at the Evans Building as per DO2017/49 (Feasibility icw luxury accommodation – Evans Building project’ then Malta Strategic Partnership Projects Ltd. would have responded accordingly”*.

FREEDOM OF INFORMATION APPLICATION

5. On the 7th September 2022, the applicant applied for a decision notice pursuant to article 23(1)(a) of the Act, requesting the Information and Data Protection Commissioner (the **“Commissioner”**) to decide whether the Public Authority had dealt with the FOI request in accordance with the requirements of the Act. In particular, the applicant argued that *“since the Government Gazette of the Republic of Malta, published by the Department of Information clearly makes reference to this document, one can blame no person for having a reasonable belief that the document does in fact exist”*. A copy of the Government Gazette 19, 967, dated the 23rd March 2018, was provided by the applicant alongside the application.

INVESTIGATION

Admissibility of the Freedom of Information Application

6. After having considered that the applicant is an eligible person in terms of article 2 of the Act and the nature and background of this FOI application, together with the procedural steps involved between the applicant and the Public Authority in the request for document, the

Commissioner deemed the application made by the applicant as admissible for the purpose of article 23(2) of the Act.

Submissions received from the Public Authority

7. As part of the investigation procedure, by means of an information notice dated the 9th September 2022, issued in terms of article 24(1)(a) of the Act, the Commissioner requested the Public Authority to provide information in relation to the FOI application for the purposes of enabling him to exercise his functions under the Act and to determine whether the Public Authority has complied or is complying with the requirements of the Act. In particular, the Commissioner requested the Public Authority to clarify how the Government Gazette published information in relation to a direct order awarded by Projects Malta Ltd to Reanda, but the Public Authority does not hold the feasibility study or paid for the feasibility study.
8. On the 6th October 2022, the Public Authority provided the following salient arguments in relation to the FOI application:
 - a. that the Public Authority does not rebut the fact that it had awarded a direct order as published on the 23rd March 2018 in the Government Gazette 19, 967 and that it is indeed true that such notice was published and award made;
 - b. that, however, publishing the award of a direct order in terms of law in no way implies that the service being requested is eventually delivered, nor that the payment has been effected; and
 - c. that there is no procedure nor law requiring the Public Authority to inform the public, through the Government Gazette, or any other means, that the objective of such an award was effectively not reached since for one reason or another, the service was not provided and the payment was not made.

Submissions received from the applicant

9. As part of the investigation of this FOI application, the Commissioner requested the applicant to submit any substantial evidence to effectively demonstrate that the requested document does

indeed exist and is held by the Public Authority. On the 26th October 2022, the applicant provided the following arguments:

- a. that the information concerning the direct order published in the Government Gazette is uncontested;
- b. that if the direct order was cancelled by the Public Authority, then the Public Authority should be in a position to furnish the Commissioner and the applicant with a copy of the correspondence notifying the awardee of such cancellation;
- c. that if the direct order was not initially cancelled by the Public Authority, but was cancelled by the awardee, then the Public Authority should be in a position to furnish the Commissioner and the applicant with a copy of the correspondence notifying the Public Authority of said cancellation;
- d. that if the direct order was not initially cancelled, neither by the Public Authority nor the awardee, but was subsequently undelivered, it is reasonable to expect that the Public Authority then proceed to cancel the direct order, in which case the Public Authority should be in a position to furnish the Commissioner and the applicant with a copy of the correspondence notifying the awardee of such cancellation; and
- e. that it is to be noted that on the 11th October 2022, a few weeks after the Public Authority sent its submissions to the Commissioner, Prime Minister Robert Abela announced that Valletta's Evans Building will be opened up to private sector investment through public-private partnerships¹.

Final Submissions received from the Public Authority

10. On the 18th November 2022, the Public Authority submitted the following arguments:

- a. that the applicant should be informed that although the Public Procurement Regulations provide for a specific process to be followed when issuing direct orders exceeding a

¹ <https://timesofmalta.com/articles/view/three-public-buildings-development-privatepublic-partnerships.986834>

certain threshold, however, there is no obligation relating to ‘cancelling’ a direct order if the objective of such a direct order is not pursued;

- b. that it is pertinent to note that where an applicant wishes to request a document falling outside of the scope of the original request, he should file a fresh request, however, for the sake of expediency and efficiency of processes, the Public Authority could hereby inform the applicant that no cancellation was ever issued, since this was never a requirement, and the objective of the direct order in question was simply not pursued; and
- c. that in relation to the last point raised by the applicant (vide paragraph 9(e) of the decision notice), the Public Authority noted that this is simply a speculative comment and falls outside the scope of this exercise, and that contrary to the impression that the applicant is attempting to portray, the fact that a related project was mentioned by Prime Minister Robert Abela in the news, in no way contradicts what the Public Authority has been repeatedly stating in relation to the document requested in the FOI request.

- 11. On the 10th January 2023, the Public Authority provided a declaration signed by the Head of the Public Authority, affirming that the document requested is not held by the Public Authority. A copy of the sworn declaration dated the 9th January 2023 is being annexed and marked as **Doc. IDPC 1**.

LEGAL ANALYSIS AND DECISION

- 12. In the legal analysis of this case, the Commissioner sought to establish whether the Public Authority had complied with the requirements of the Act, when it refused the request of the applicant on the basis of article 14(g) of the Act.
- 13. In this regard, the Commissioner assessed article 14(g) of the Act, which states that a request made in accordance with article 6 of the Act may be refused if “*the document requested is not held by the public authority and the person dealing with the request has no grounds for believing that the document is held by, or connected more closely with the functions of, another public authority*”.

14. For the purpose of the investigation of this FOI application, the Commissioner proceeded to determine whether the document, as defined in article 2 of the Act, is held by the Public Authority. In the replies provided to the applicant and, during the course of the investigation, the Public Authority confirmed that the document requested by the applicant is not in its possession.
15. This was specifically substantiated by means of a sworn declaration (herewith attached and marked as “**Doc. IDPC 1**”), wherein the head of Public Authority stated that the document requested by the applicant is not held by the Public Authority.
16. To this effect, the Commissioner requested the applicant to submit concrete evidence to demonstrate that the requested document is indeed held by the Public Authority. In this respect, the Commissioner considered the case-law of the Court of Justice of the European Union, which establishes that an applicant should submit relevant and consistent evidence capable of rebutting the presumption of legality and veracity when a European Institution claims that it is not in possession of the document requested by an applicant. The Court of Justice of the European Union held that a *“presumption of legality attaches to any statement of the institutions relating to the non-existence of documents requested. Consequently, a presumption of veracity attaches to such statement. That is, however, a simple presumption which the applicant may rebut in any way by relevant and consistent evidence”*².
17. For this purpose, the Commissioner examined whether the applicant had submitted relevant and consistent evidence to demonstrate that the document requested is indeed held by the Public Authority. In his reply provided on the 26th October 2022, the applicant merely stated that the Public Authority should provide him with documentation that he did not request in his FOI request, specifically *“a copy of the correspondence notifying the awardee of said cancellation”* or *“a copy of the correspondence notifying the PA of said cancellation”*. This therefore led the Commissioner to conclude that the applicant had failed to submit any concrete evidence which could effectively demonstrate that the requested document is indeed held by the Public Authority.

² T-496/13, Colin Boyd McCullough vs European Centre for the Development of Vocational Training (Cedefop), 11th June 2015, para. 50.

On the basis of the foregoing considerations, pursuant to article 23(3)(b) of the Act, the Commissioner is hereby serving a decision notice and deciding that the refusal of the Public Authority in terms of article 14(g) of the Act is justified.



Ian Deguara
Information and Data Protection Commissioner

Decided today, the 12th January, 2023

Right of Appeal

In terms of article 39(1) of the Act where a “[w]here a decision notice has been served, the applicant or the public authority may appeal to the Tribunal against the notice within twenty working days.”

An appeal to the Information and Data Protection Appeals Tribunal shall be made in writing and addressed to:

The Secretary
Information and Data Protection Appeals Tribunal
158, Merchant Street
Valletta.

Today the 9th of January of the year 2023.

Sworn declaration of Ms. Marisa Marmara, holder of Identity Card number [REDACTED] made in representation of Malta Strategic Partnership Projects Limited (C64764) (hereinafter referred to as the Company) and in her capacity as Chief Executive Officer of the company:

In terms of the email request made by Ms. Kathleen Xerri, Senior Legal Counsel, Office of the Information and Data Protection Commissioner, on the 27th of December 2022, and on the basis of the information and documentation made available to me as from the date of my appointment as Chief Executive Officer of the company, I hereby declare that the document requested by the applicant in the Freedom of Information request bearing reference number FOI/41/2022 is not held by Malta Strategic Partnership Projects Limited (C64764) and I have no grounds for believing, nor am I aware, that the document is held by, or connected more closely with the function of, another public authority.



Ms. Marisa Marmara

[REDACTED]

Illum 9 ta' Jannar 2023
Deher Marisa Marmara
I.D. No. [REDACTED]
halef li-korrezzza ta' dan l-att/
waqt li qrajtulu


NADINE FARRUGIA B.A. I.P.
Commissioner for Data Protection